

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>ROBERT P. LANIERI</b>	:	DETERMINATION
	:	DTA NO. 818993
for Revision of a Determination or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Period June 1, 1997 through May 31, 1998.	:	

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Petitioner, Robert P. Lanieri, P.O. Box 66, Port Jefferson, New York 11777, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1997 through May 31, 1998.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on December 13, 2002 at 11:15 A.M., with all briefs to be submitted by April 4, 2003, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Barbara J. Russo, Esq., of counsel).

***ISSUE***

Whether, during the assessment period, petitioner was a person responsible for collection and payment of sales and use taxes on behalf of MMR Restaurant Corp.

***FINDINGS OF FACT***

1. On September 14, 2000, the Division of Taxation issued to petitioner a notice of determination which set forth additional sales tax due of \$28,863.00 and interest of \$6,694.13 for

a total amount due of \$35,557.13 for the period June 1, 1997 through May 31, 1998 (the “period in issue”). The notice stated that it had been issued for the following reasons:

This notice is issued because you are liable as an Officer/Responsible Person for taxes determined to be due in accordance with sections 1138(a), 1131(1), and 1133 of the New York State Tax Law.

Our records indicate that you are/were an Officer/Responsible Person of:  
MMR RESTAURANT CORP.

2. Petitioner, Robert Lanieri, worked in the restaurant industry for over 25 years, at different times owning and managing restaurants and bars. He began working for MMR Restaurant Corp. (the “corporation”) in 1997 and left in 1998. His New York tax returns for those years indicate that he received W-2 earnings from the corporation of \$17,392.00 in 1997 and \$14,116.00 in 1998. Most of petitioner’s income for both years was earned from the corporation.

3. In February 1997, he helped a friend, Mario Desena, open a restaurant owned by the corporation called The Place & Sandwich Co. in Miller Place, New York. The corporation had one shareholder and director, Mario Desena, who alone made capital investments in the corporation and was responsible for signing and filing sales tax returns on behalf of the corporation for the period in issue.

4. Petitioner and Roy Radzinsky were employed to operate the restaurant, the former overseeing the bar operations and the latter supervising the kitchen operations.

5. During the start-up of the business, petitioner used his friendship with the property owner to help Mr. Desena acquire a lease on the premises where the business was opened. No copy of the lease was placed in evidence but petitioner, as an inducement for granting the lease and as an uncompensated favor to Mr. Desena, executed an undated guaranty which purportedly

had been annexed to the lease and which guaranteed the full payment and performance of all obligations of the tenant under the lease.

Later the same year (1997), petitioner listed the guaranty to indicate the lessor was an unsecured creditor in his Chapter 7 bankruptcy proceeding. It was not disclosed whether the guaranty in evidence was related to the one referenced in petitioner's testimony and the document itself is devoid of any reference to the lease or property involved in this matter.

6. It is undisputed that petitioner was a manager at the restaurant during the period in issue. He issued checks on behalf of the business, hired and fired employees, signed contracts on behalf of the corporation and received the majority of his income for the years in issue as an employee of the corporation. In addition, on several occasions, at the direction of Mr. Desena, he delivered bank statements to Mr. Desena's accountants which were used in the preparation of sales tax returns.

7. As a salaried employee of the corporation, petitioner's job duties included opening the restaurant, turning on the kitchen equipment, stocking the cash drawer, ordering food and beverages and tending bar. The restaurant was open every day from 11:00 A.M. to 3:00 A.M., and several persons, including Mr. Desena, closed the business, which included clean-up, arming the security system, checking the cash register tape against receipts and depositing cash in the safe. Petitioner also did minor maintenance and cleaning.

8. Petitioner and Mr. Radzinsky placed orders with vendors to replenish inventory and contracted with tradesmen for necessary services. All purchases and petitioner's issuance of checks therefor, either directly or indirectly, were authorized first by the owner, Mr. Desena.

9. Petitioner signed a contract for an alarm system for the restaurant in March of 1997 on behalf of the corporation with Sound Security & Electronics, Ltd. and another with A.R.B.

Mechanicals in October 1997. With respect to the former, petitioner was directed to enter into the contract by the owner and president of the company, Mario Desena, and only did so with Mr. Desena's prior approval. With respect to the latter contract, the work was done for a Ms. Koch, an acquaintance of petitioner, to repay a debt owed to Ms. Koch by Mr. Desena. The contract was characterized as a resolution to a personal dispute over payment for office furniture provided to Mr. Desena by Ms. Koch at the inception of the restaurant business. Charging the service to the restaurant was authorized by Mr. Desena and was intended to settle the personal dispute involving the debt owed by Mr. Desena to Ms. Koch.

10. Mr. Desena was engaged in an additional business venture during the audit period, yet managed to be present at the restaurant on a frequent basis, making bank deposits and reviewing business records. Mail, receipts, bills, invoices and deposits were left for Mr. Desena on his desk for his review. Mr. Desena, by his written authorization on a postal form, designated Mr. Lanieri and Mr. Radzinsky to receive the corporation's mail at the restaurant. On some occasions, bank deposits were made by petitioner, Mr. Radzinsky and other employees.

11. During the audit period, Mr. Desena directed his accounting firm, Advisory Associates, to prepare his sales tax returns. Mr. Desena had maintained a professional relationship with this firm and its owner, Julius Veit, for over 20 years. According to one of the firm's employees, Eileen Gibson McCormick, when the returns were coming due, the firm called Mr. Desena and he would forward the necessary information to petitioner or Mr. Radzinsky and someone from the restaurant would deliver the documentation to the accounting firm. Mr. Desena, not petitioner, was always the person with whom the firm communicated with respect to tax matters. Further, Mr. Desena was responsible for paying the tax and signing and filing the tax returns.

12. The documentation petitioner brought to Ms. McCormick's office on several occasions during the audit period consisted of bank statements which were used in the preparation of sales tax returns. However, other employees also delivered documentation to her, including Mr. Radzinski and Mr. Desena.

13. Ms. Koch, petitioner's friend who had personally witnessed these events, accompanied petitioner when he dropped off bank statements to Mr. Desena's accountants and observed that no discussion of the documents or any other tax matters took place between petitioner and anyone at the accountant's office. Ms. Koch stated that petitioner did not involve himself in the corporation's paperwork.

14. The Division's audit in this matter was commenced on February 24, 1999. Initially, the corporation was represented by Advisory Associates. On May 12, 2000, the auditor had a lengthy discussion with Joseph Rouse, CPA, the brother of the attorney representing Mr. Desena in a lawsuit with petitioner and Mr. Radzinsky over payment of their wages. The focus of the discussion was Mr. Rouse's belief that the employees, and not Mr. Desena, should be liable for sales taxes. On June 1, 2000, Mr. Rouse appeared at the district office and met with the auditor to further discuss the audit. At this meeting, Mr. Rouse presented the following documentation in support of his position that petitioner and Mr. Radzinsky were persons responsible for the collection and payment of sales tax:

a. Random pages from the record of petitioner's personal bankruptcy proceeding, including a listing of the guaranty of the company's lease in the sum of \$20,000.00;

b. A contract between Sound Security and Electronics, Ltd. and the corporation, dated March 31, 1997, for an alarm system, signed by petitioner on behalf of the corporation;

c. Statements from Julius Veit and Eileen Gibson of Advisory Associates, both undated, generally stating that they believed petitioner to be liable for the sales and use taxes due for the period in issue;

d. Statement of Anthony Bua, owner of A.R.B. Mechanical, with “6/15/00” handwritten at the top of the page, which set forth work Mr. Bua performed for petitioner and charged to the corporation (invoice attached);

e. An affidavit of Jacqueline Coogan, former employee, dated June 14, 2000, which expressed Ms. Coogan’s belief that petitioner was perceived as the owner of the business by vendors and that petitioner was in complete control of operations, including inventory, receipts and payroll records;

f. Statement of Brian Banigan, dated June 14, 2000, in which he stated that he had been a bartender and observed petitioner’s behavior and believed he was the owner based on same;

g. An affidavit of Kathy Marino, dated June 14, 2000, in which she stated that based on her observations, petitioner appeared to be an owner of the business because he represented that to her, and to vendors and customers and handled all the receipts, money and banking;

h. A copy of a Guaranty, undated, signed by petitioner, which guaranteed the full payment and performance of all obligations under an unidentified lease; and

i. A copy of delivery instructions executed and filed with the Postal Service by Mr. Desena, authorizing petitioner and Mr. Radzinsky to receive the corporation’s mail at its business address.

15. A “responsible person questionnaire” with respect to petitioner, dated July 5, 2000, prepared by Joseph G. Rouse, CPA, Mr. Desena’s accountant, was submitted to the Division of Taxation. The answers in the questionnaire were based on the documentation set forth in

Finding of Fact “14” above, checking account information and communications with the corporation’s accountants, Advisory Associates. Essentially, the document was a recount of other information provided by Mr. Desena’s accountants and depicted petitioner as the person responsible for running all aspects of the business.

16. The auditor was convinced of petitioner’s liability by the evidence provided to him by Mr. Rouse even though he conducted no independent investigation of the information provided.

17. Petitioner also filed a “responsible person questionnaire” in his own behalf which differed substantially from the form submitted by Mr. Rouse. Petitioner denied responsibility for preparation or supervision of the preparation of sales tax returns and ensuring the remittance of tax; participation in making significant business decisions; and responsibility for maintaining and managing the business. Petitioner also denied that he had the authority to manage the business with knowledge and control over its financial affairs or represent the corporation with the Tax Department.

18. Petitioner explained in his questionnaire that his job duties included bartending, cooking, construction and maintenance work. To the extent he was required to sign corporation checks, he did so for cash-on-delivery creditors and suppliers as instructed by Mr. Desena. In addition, petitioner asserted that he was one of many employees with the authority to pay creditors.

19. According to the audit work papers, the auditor recorded the issuance of about 26 canceled checks written on the operating account and issued to vendors during the audit period and which were mostly signed by petitioner. He indicated no independent knowledge as to whether petitioner was directed to issue these checks by Mr. Desena. His only information

concerning the actual operation of the business was gleaned from Mr. Desena's representative, who also lacked first-hand knowledge of the business.

20. Although there were many discrepancies between the two responsible person questionnaires filed on behalf of petitioner, the auditor conducted no further investigation choosing instead to rely upon the information prepared and provided by Mr. Rouse.

21. Petitioner was not authorized to sign payroll checks, which were drawn from another account. Yet, in the responsible officer questionnaire submitted by Mr. Rouse, it was stated that petitioner signed both operating and payroll checks. Further, in the affidavit of Jacqueline Coogan, she averred that all payroll records went through petitioner. The Division did not verify the information provided.

22. Mr. Desena, the owner of the corporation, also performed some day-to-day management functions on a regular basis, in addition to managing another corporation. Since the restaurant was open seven days, Mr. Desena was able to work weekends and nights. In addition, he called petitioner several times a day and directed him to pay specific bills.

23. Mr. Desena delivered bank statements to the restaurant and directed petitioner to deliver them to his accounting firm. The address on the operating account checks was Mr. Desena's personal address, P.O. Box 980, Port Jefferson, NY, not that of the restaurant.

24. Mr. Desena directed petitioner and other employees who closed at night to reconcile the register tapes with the cash in the register. The cash on hand was placed in a safe and then deposited the next morning by Mr. Desena, one of his children or one of the employees, including petitioner.

25. Bills, vendor and supplier invoices and other business mail were left for Mr. Desena on his desk in the office, but petitioner did not maintain or review those records. All tax related



mail was sent directly to Mr. Desena at P.O. Box 980, Port Jefferson, NY. This address was listed on the operating account for the corporation and was its official address with the Department of Taxation and Finance. It was also the address used when the business was sold in 1999 to Sadie Restaurant LLC.

26. Petitioner placed in evidence selected pages from an examination before trial from the case ***Lanieri v. MMR Restaurant Corp. and Mario Desena***, which was pending in the Suffolk County District Court. The action was brought by petitioner to recover back wages he alleged were due from the corporation after payroll checks issued by the corporation and signed by Mr. Desena proved uncollectible.

27. Mr. Desena issued a bad check to the Department of Taxation and Finance in the sum of \$5,205.97 on December 20, 1997, written on the corporation's operating account.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 1133(a) imposes personal liability for taxes required to be collected under Articles 28 and 29 of the Tax Law upon a person required to collect such tax. A person required to collect such tax is defined as "any officer, director or employee of a corporation . . . who as such officer, director or employee . . . is under a duty to act for such corporation . . . in complying with any requirement of [article 28]" (Tax Law § 1131[1]).

B. The determination that an individual is a responsible person depends upon the particular facts of each case (***Stacy v. State***, 82 Misc 2d 181, 183, 368 NYS2d 448, 451; ***Matter of Autex Corp.***, Tax Appeals Tribunal, November 23, 1988). The relevant factors to consider when determining whether a person has such a duty to act for the corporation include, *inter alia*, authorization to sign the corporate tax return, responsibility for management or maintenance of the corporate books, authorization to hire and fire employees and derivation of substantial

income from the corporation or stock ownership (*see*, 20 NYCRR 526.11[b][2]; *Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564; *Matter of Blodnick v. State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536, *appeal dismissed* 69NYS2d 822, 513 NYS2d 1027; *Matter of Rosenblatt v. State Tax Commn.*, 114 AD2d 127, 498 NYS2d 529, *revd in part on dissenting opn below* 68 NY2d 775, 506 NYS2d 675).

C. In *Matter of Vogel v. Department of Taxation and Finance* (98 Misc 2d 222, 413 NYS2d 862), the court stated:

The general language of section 1131 (subd. 1), defining persons who are required to collect taxes, includes only those officers of a corporation who are 'under a duty to act for such corporation.' The resolution of whether an officer is under a duty to act, then, turns on a factual determination.

Indicia of this duty would include factors which directly relate to compliance with Article 28, such as the officer's day-to-day responsibilities and involvement, with the financial affairs and management of the corporation, his knowledge of such matters, the officer's duties and functions outlined in the certificate of incorporation and the bylaws, and the preparation and filing of sales tax forms and returns (see, *Chevlowe v. Koerner*, 95 Misc 2d 388, 391-392, 407 NYS2d 427, 429-430, *supra*). Furthermore, in situations involving closely held corporations, as in the present case, an officer's knowledge of the corporate affairs and his benefits received from corporate profits would be extremely important considerations.

Indeed, the Division's own regulations define a person under a duty to act on behalf of a corporation as

[g]enerally, a person who is authorized to sign a corporation's tax returns or who is responsible for maintaining the corporate books, or who is responsible for the corporation's management, is under a duty to act. (20 NYCRR 526.11[b][2].)

D. In light of all the evidence presented in this matter, including the credible testimony of petitioner, petitioner was not such a person under a duty to collect tax on behalf of MMR Restaurant Corp.

In the first instance, the Division's acceptance of information supplied to it by an advocate for a very hostile party with distinctly conflicting interests related to the very tax the Division sought to collect from petitioner was, at best, ill advised. Mr. Rouse submitted self-serving and well-choreographed statements, documents and his own memorandum produced for the sole purpose of shifting liability from his client to petitioner. The statements contained very similar, if not identical, language and similar characterizations of petitioner, portraying him as the person under a duty to collect tax on behalf of the corporation. Further, only two of the statements, those of Jacqueline Coogan and Kathy Marino, fellow employees at the restaurant, were properly sworn before a notary public, carrying the full force and weight of an affidavit. The other statements were not properly sworn and are accorded less weight than an affidavit. However, given the similar language contained in each and their origin, their value was greatly diminished even without the notarial flaw. Therefore, they command little weight.

E. It became apparent at the hearing that the statements submitted through Mr. Rouse were not accurate. Petitioner's credible testimony established that he was experienced in the operations of restaurants and was chosen by the corporation's sole officer and stockholder to help him open the business. However, after using his friendship with the owner of the premises to acquire a lease for the corporation and guaranteeing the corporation's obligations under the lease,<sup>1</sup> he assumed his role of a salaried employee with specific duties dictated by Mr. Desena. Although the Division contends that petitioner had a high level of autonomy and control, the evidence belies such a conclusion.

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<sup>1</sup>The guaranty in evidence, although signed by petitioner, did not refer to any specific lease or property and is undated. There was no evidence that it was the one the Division contended it was. However, petitioner did concede to guaranteeing the lease on the premises and listed it among his creditors in his personal bankruptcy in the sum of \$20,000.00. Mr. Desena realized \$100,000.00 on the sale of the business in 1999, and the lease was assigned to the new owner. It was not disclosed if the guaranty was discharged in petitioner's bankruptcy in 1997, but it does not appear in the closing documents in evidence.

Although petitioner was directed by Mr. Desena to enter into a contract for a security system, pay specific vendors and deliver bank statements to Mr. Desena's accounting firm on occasion, he had no independent authority to spend the corporation's funds as he wished. Each expenditure was subject to approval by Mr. Desena. Petitioner's check-signing capacity on the operating account was for the convenience of Mr. Desena, who was not present at the restaurant during the day when deliveries were made.

The address on the operating account, noted on its checks, was Mr. Desena's personal address, indicating that the statements were mailed to him and that he alone controlled the financial records of the corporation, which were used to prepare the sales tax returns. Petitioner had no meaningful access to them. Further, it is of no moment that petitioner occasionally delivered these statements to Mr. Desena's accounting firm, since he was one of several people to deliver them.

The Division's reliance on the statement and testimony of Ms. Gibson McCormick was misplaced. In her undated statement prepared by Mr. Rouse, she claimed that petitioner provided her with all the accounting information needed to prepare the tax returns for the corporation. However, she admitted in her testimony that he only brought her the bank statements which had been sent to him by Mr. Desena and that she never saw or inquired about any source documentation. In fact, she even testified she did not know where the bank statements of the corporation's operating account were mailed, even though she had used them to prepare the sales tax returns and was privy to the address listed on all the statements. As previously discussed, the account bore the personal address of Mr. Desena, and it is concluded that the statements were sent to him and then were delivered to his accounting firm by a designated employee.

Finally, Ms. Gibson McCormick had a cloudy memory of meetings with petitioner during the audit period. She could not remember with certainty the number of times she thought she met with petitioner, and she contradicted herself when trying to recall who she would call when sales tax returns were due, first saying it was petitioner then Mr. Desena.

Although Ms. Gibson McCormick recalled that she spoke with petitioner about the preparation of the sales tax returns when he dropped off the bank statements, both petitioner and Ms. Koch credibly testified that petitioner did nothing but drop off the statements as he had been instructed to do.

F. Petitioner credibly testified that, despite the allegations in the Coogan affidavit and the Banigan statement (which contain strikingly similar language), he did not hire Coogan or even know her well, and he never represented to anyone that he owned the business. Petitioner conceded that he closed out the register at the end of the night, and shared that duty with several other employees. Given the extensive number of hours that the restaurant was open, it would be impossible for one individual to do it each night. However, the consistent thread was Mr. Desena's appearance, or that of his son or daughter, to make the bank deposits on a very frequent basis. Although there were many unsworn, second-hand statements alleging that petitioner alone closed the register and made bank deposits, the only credible evidence and the only first hand knowledge was petitioner's testimony and that of Ms. Koch, stating that many shared the duty. Given the nature and source of the statements, the lack of a basis for Ms. Gibson McCormick's assertions concerning petitioner's job duties and the Division's failure to independently investigate the facts asserted by a clearly biased representative, it is concluded that petitioner was one of several employees who was directed to close the register, make bank deposits and deliver bank statements to Mr. Desena's accounting firm.

G. The Division also introduced a document it received from Mr. Rouse which it believed illustrated petitioner's authority to independently bind the corporation and direct payment of its resources. The statement of Anthony Bua of A.R.B. Mechanical and the attached bill for services performed at Ms. Koch's home only told half of the story, however. Once again, the very credible testimony of petitioner and Ms. Koch demonstrated that the services were rendered to Ms. Koch in settlement of a debt owed by Mr. Desena to Ms. Koch and were first approved by Mr. Desena, demonstrating that this transaction was not proof that petitioner had independent authority and control over the business.

H. Likewise, the Division made much of the postal form executed and filed by Mr. Desena, authorizing petitioner to receive mail at his business address. Obviously, since he was not present at the business location during the day, Mr. Desena needed to appoint someone to receive his mail in his absence. The ministerial act of receiving mail for Mr. Desena did not equate to controlling the mail received or reviewing such mail. In fact, petitioner explained that the mail was routinely placed on Mr. Desena's desk for his review. Petitioner did not open or review the bills or other mail received there.

I. Mr. Rouse did not let the facts get in the way when preparing a responsible person questionnaire for petitioner. In the questionnaire, Mr. Rouse stated that petitioner was responsible for running all aspects of the business; signed payroll checks; prepared sales tax returns; and ensured the remittance of tax. He also stated that petitioner had the authority to sign deferred payment agreements and had knowledge and control over the financial affairs of the corporation. The stated basis for all of these allegations were the affidavits Mr. Rouse prepared and submitted with his memorandum to the Division; the checking account, the statements for which were under the direct control of Mr. Desena; and confirmation by Mr. Desena's

accounting firm. The clear motivation for Mr. Rouse's characterizations, and part of the reason he was hired, was to shift sales tax liability from his client to petitioner. Curiously, the one person with first hand knowledge of the facts who could have testified or submitted an affidavit did not do so. Instead, Mr. Desena chose to hire various professionals to carefully construct a case against petitioner which was then artfully presented to the auditor, who chose to accept these skewed facts without any independent investigation, despite the conflicting statements contained in the questionnaire submitted by petitioner.

J. From the credible testimony of petitioner and Ms. Koch it is concluded that petitioner's involvement in the corporation was limited to the normal duties of a manager: ordering inventory and supplies; cleaning; tending bar; sharing the duty of closing the registers at the end of the day; delivering documentation to the corporation's accounting firm; hiring and firing personnel; and signing checks on the operating account. Although he used his friendship with the property owner to help Mr. Desena acquire a lease and then guaranteed the corporation's obligations thereunder, this altruistic act earned him no financial stake in the corporation or a greater salary than similar employees like Mr. Radzinsky. For his services he received a salary that happened to constitute a substantial portion of his income during 1997 and 1998.

These are not insignificant indicia of responsibility when determining a person's duty to collect sales and use tax on behalf of a corporation. However, they must be weighed in the unique context which presents itself in the matter at hand. Here, petitioner's job duties were dictated by Mr. Desena. Although he was given the authority to issue checks on the operating account and used the authority to pay suppliers, he did so merely as a convenience to his employer and, as credibly testified to by petitioner, he was specifically told which bills were to be paid and in what order. Mr. Desena received and maintained the bank records for the

operating account and only entrusted them to petitioner for delivery to his accounting firm for preparation of tax returns. Mr. Desena alone conversed with the firm and arranged for records to be delivered to them for the preparation of sales tax returns during the audit period. This was natural given his lengthy relationship with Advisory Associates. He reviewed the returns, signed them and was responsible for remitting the tax. Petitioner was not involved with this process, had nothing to do with the creation or maintenance of books and records and had no relationship with the accounting firm. Notwithstanding the testimony of Ms. Gibson McCormick, which is not found credible given her memory lapses and contradictions, petitioner did not discuss the preparation of sales tax returns with her nor did he have the knowledge of the financial affairs of the corporation to do so. It simply was not within the scope of his employment. Further, there was no dispute that petitioner was never given authority to issue payroll checks and was not privy to the records for that account. In fact, several payroll checks issued to him were not honored due to insufficient funds and he has instituted legal action against the corporation for back wages.

The only access petitioner had to the books and records was that afforded him by Mr. Desena, who totally controlled such access. The fact that the bank records were sent to Mr. Desena's personal address confirmed that all access to them was at his discretion. It would be absurd to conclude that petitioner would have any authority to demand access to these records when he held no corporate office, possessed no stock and had not invested any money in Mr. Desena's corporation.

The closing of registers and occasional bank deposit was a duty shared by several employees, and by Mr. Desena and his children. It was not a function that can be interpreted as indicative of financial responsibility.



The facts in this matter are far more compelling than those in *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990), where a corporate officer, investor and guarantor of the corporation's loans was found not liable for sales and use taxes because he did not have meaningful access to the books and records of the corporation. In *Constantino*, that petitioner was found not to be a person under a duty to act on behalf of the corporation due to his lack of knowledge of the financial affairs of the corporation, the fact that he was a salaried employee and never received any distribution of profits from the corporation. In the instant matter, petitioner did not share in the \$100,000.00 Mr. Desena received on the sale of the business in 1999.

K. In all, the evidence submitted by Mr. Desena's representative and resubmitted by the Division in both the audit work papers and as individual exhibits are accorded little weight given the clear motivation for their generation and the lack of credible testimonial or documentary evidence to support the assertions contained in the statements, affidavits, documentation and memorandum. The credible testimony of petitioner and Ms. Koch provided clear and logical explanations of the business practices of the corporation, while simultaneously raising serious doubt about the veracity of the statements and the context and meaning of the documents.

L. The petition of Robert P. Lanieri is granted and the Notice of Determination, dated September 14, 2000, is canceled.

DATED: Troy, New York  
July 31, 2003

/s/ Joseph W. Pinto, Jr.  
ADMINISTRATIVE LAW JUDGE